

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA**

WEDNESDAY, THE 19TH DECEMBER 2007 / 28TH AGRAHAYANA 1929

CRL.A.No. 1643 of 2005(C)

S.C.387/2002 OF II ADDL.SESIONS COURT, ERNAKULAM.

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APPELLANTS/ ACCUSED NO.1 & 2:

- 1. PETER, S/O.VARKEY, PARAVARA VEEDU, MARADU
DESOM, MARADU VILLAGE, ERNAKULAM DISTRICT.**
- 2. JAMES, S/O.VARKEY,
PARAVARA VEEDU, MARADU DESOM, MARADU VILLAGE,
ERNAKULAM DISTRICT.**

**BY ADV. SRI.JAIJI ITTEN,
ADV. SRI.PRAMOD JAIJI.**

RESPONDENT/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI.K.C. SANTHOSH KUMAR.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 19/12/2007, ALONG WITH CRL.A. NOS. 1650/2005,1948/2005
& CRL.R.P. NO. 70/2006 ,THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

J.B.KOSHY & K.HEMA, JJ.

Crl.A.Nos.1643, 1650, 1948 of 2005
and Crl.R.P.No.70 of 2006

Dated 19th December, 2007

JUDGMENT

Koshy,J.

Eleven persons faced trial for brutally murdering one Sunil Kumar in the early morning at 7.15 a.m. on 03.08.1999. The prosecution case was that the accused 1 to 11 assembled in the house of 11th accused situated at Maradu Desom in the night of 02/08/99 and hatched a conspiracy to do away with deceased Sunil Kumar. According to the prosecution, deceased Sunil Kumar and family were inimical to the 11th accused and their family and earlier also there were disputes between them. In furtherance of the conspiracy, the accused persons 1 to 10 formed into an unlawful assembly at 7.15 a.m. on 03/08/1999, armed themselves with deadly weapons such as swords, iron rod, iron pipe and knife and waited on the side of Chambakkara – Kannadikkadu road about 120 metres west of Chambakkara junction near the house of CW6. Meanwhile, Sunil Kumar came on his motor cycle KL-7/U-526 from west to east along with CW2 Shaji (PW2) as a pillion rider. When the motor cycle reached near the place where the accused were waiting, accused 1 to 3, sons of A11, suddenly came in front of the motor bike and wrongfully restrained the deceased from going further. In the meantime,

accused 4 and 5 rushed to the spot and they forcibly took CW2 from the motor bike threatening him that he will be killed showing the swords. Thereafter he was taken to the northern side of the road and accused 4 and 5 stood as guards to CW2. After that, the second accused inflicted injury on the head of the deceased by using his sword. In the meantime, the first accused inflicted a cut injury on the side of the left ear and the third accused inflicted cut injuries on the left shoulder and on the side of left ear by using his sword. Thereafter, the 7th accused gave blow on the left side of Sunil Kumar by using an iron rod. As a result, Sunil Kumar fell down from the bike towards the northern side of the road and, thereafter, accused 1 to 3 inflicted several injuries on the deceased. The 7th accused again gave a blow on the left shoulder and 9th accused hit on the lip of deceased with an iron pipe. Thereafter, accused 6, 8 and 9 stabbed the deceased with knife on the left and right side of chest and on the thighs. The fourth accused inflicted a cut injury on the left leg and the 5th accused inflicted cut injuries below the left knee and below right elbow. The first accused also repeatedly inflicted three cut injuries on the neck of the deceased by using the sword and the injured Sunil Kumar died on the spot. The accused persons have subsequently washed their clothes. The pants of the 7th accused was thrown into the river and thereby caused disappearance of evidence. Hence the accused committed the offences punishable under Sections

143, 147, 148, 120(b), 341, 506(ii), 201 and 302 read with section 149 of the Indian Penal Code and section 27 of the Arms Act. The trial court found accused 1 to 4 and 9 guilty for the offences punishable under sections 143, 147, 148, 341 and 302 read with section 149 of the Indian Penal Code and section 27 of the Arms Act and acquitted of all other offences. Other accused were acquitted of all offences charged. Accused Nos.1 and 2 filed Crl.A.1643/2005, accused No.3 filed Crl.A.No.1650/2005 and accused Nos.4 and 9 filed Crl.A.No.1948/2005. PW1, brother of the deceased, filed Crl.R.P.No.70 of 2006 questioning the acquittal of some of the accused. All these cases were heard together.

2. Before going into the merits of the case, we may consider the postmortem certificate. The doctor (PW21) who conducted postmortem examination noted the following ante-mortem injuries in Ext.P19 postmortem certificate:

- “1. Superficial incised wound 3.5 x 0.5 cm front of left leg 5 cm above the ankle.
2. Incised wound 1 x 0.5cm on the front of left leg 16 cm below the knee.
3. Superficial incised wound 1 x 0.5cm 1cm right to injury No.2. Under injuries No.1&2 the underlying bone was found fractured.
4. Incised wound 3 x 1cm 12cm below left knee.

Underlying bone fractured.

5. Incised wound 8 x 1cm 4cm below left knee. Underlying bone fractured.
6. Muscle deep incised wound 4x1cm on the other aspect of left knee.
7. Stab wound 2.5x1.8x3cm on the front of left thigh 14.5cm below anterior superior iliac spine. The upper and inner end contused and the other end sharply cut.
8. Abrasion 0.5x0.5cm on the back of left elbow.
9. Superficial incised wound 0.7x0.2cm. On the outer aspect of left upper arm 6cm above left elbow.
10. Superficial incised wound 0.5x0.2cm on the back of left upper arm. 14cm above the elbow.
11. Incised wound 7x3cm on the top of left shoulder underlying bone fractured. Shoulder joint injured.
12. Stab wound 3x1cm vertically placed upper end slightly towards centre on the left side of abdomen. 4cm away from the umbilicus. The lower end was contused other end sharply cut. Edges of the wound clearly cut. Wound involved the entire thickness of abdominal wall. No corresponding internal injury.
13. Stab wound 3x0 cm. obliquely placed inner lower end 7.5cm away from umbilicus at 2'o clock position involving entire thickness of abdominal wall. No corresponding internal injury. Lower end contused and upper end sharply cut. Edges clearly cut.
14. Obliquely placed stab wound 3.5 x 1 cm with the inner upper end which was sharply cut lower outer end clearly cut with regular margin 4cm above the umbilicus at 12'o clock position

involving entire thickness of the abdominal wall. No corresponding internal injury.

15. Obliquely placed stab wound 4x1.5cm with sharply cut upper right end and clearly cut lower left end with regular margin involving entire thickness of abdominal wall 1cm above injury No.14.
16. Horizontally placed stab wound 4x1cm with sharply cut inner end 7cm above umbilicus at 12'o clock position. Outer end contused. The wound track involved the stomach, large bowel and duodenum. The wound was directed backwards and slightly downward and to right for a total depth of 7cm.
17. Horizontally placed stab wound 3x1cm with inner end sharply cut 1cm left to injury No.16. The outer end contused. The wound track involved large bowel stomach and yejunim injuries directed backwards and towards for total depth of 6.5cm. Outer end of the wound contused, the wound margins was regular.
18. Horizontally placed stab wound 3x1cm 10.5cm above umbilicus at 12'o clock position. Right end was contused left end clearly cut wound margins regular, directed backwards injuring the left lobe of lever for a total depth of 5cm.
19. Horizontally placed stab wound 3x1cm, 1cm above injury No.18. The right end contused, left end sharply cut, wound margins regular. The wound directed backwards injury the liver. The total depth of the wound was 5cm.
20. Stab wound 4x1.5cm Horizontally placed 9.5cm below left nipple at 7 o'clock position underlying stomach bowel and cartilages cut. Right leg contused left end sharply cut. The wound was directed downwards backwards and to right injuring right lobe of liver. Total depth was 7cm wound margins regular.

21. Horizontally placed stab wound 3x1cm. Left end 6cm below left nipple at 6 o'clock position. Right end was contused, left end sharply cut, margins regular. The wound was directed backwards for a length 5cm. Injuring left 4th rib and 4th intercostal space and left lung.
22. Horizontally placed stab wound 2.5 x 1cm, right to injury No.21. Right end was contused, left end sharply cut, wound margins regular. The wound was directed injuring 4th intercostal space and 5th rib and heart. The total depth was 4cm.
23. Stab wound 3.2 x 1cm horizontally placed in the midline of chest right end 9cm., away from right nipple at 4 O' clock position. Right end contused, left end sharply cut. Margins were regular. The wound was directed backwards injuring the sternum. The total depth was 3.5cm.
24. Stab wound horizontally placed 3x1cm, 2cm right to injury No.23. The right end contused, left end sharply cut. The margins of the wound were regular. The wound was directed backwards through 5th right costal cartilage injuring the right lung. Total depth was 4cm.
25. Horizontally placed stab wound. 2Cm x 1cm 0.2cm. Right to injury No.24. The right end contused, left end sharply cut. The wound was directed backwards through the rib on right side injuring the underlying right lung. The total depth was 3cm. The wound margins were regular.
26. Horizontally placed stab wound 3x1cm, 2cm above injury No.32. The right end was contused, left end sharply cut. The wound margins regular. The wound was directed backwards injuring the right lung and hylum of the right lung and the sternum. Total depth was 1cm.

27. Horizontally placed stab wound 2.5 x 1cm, 2.5cm, left to injury No.26 on the left side of the chest. Right end of the wound sharply cut. Left end clearly cut. Wound margins regular. The wound directed backwards injuring 3rd inter costal space injuring the heart. Total depth 4cm.
28. Vertically placed stab wound 2.5x1cm, 1.5cm away from left nipple at 10 O' clock position upper end contused lower end sharply cut. Wound margin regular. Directed backwards injuring 2nd inter costal space on left side and underlying lung. Total depth was 4cms.
29. Vertically placed stab wound 3x1.5cm lower end 0.5cms right to injury No.28. The upper end contused, lower end sharply cut. Wound margins regular. The wound directed backwards involving full thickness of the chest wall. No corresponding internal injury.
30. Stab wound 1.5x0.5cm horizontally placed right end merging with middle of injury No.29. The left end sharply cut. Wound margin regular, involving the entire thickness of chest wall. No corresponding internal injury.
31. Horizontally placed stab wound 2.5 x 1cm on the left side of chest inner end 1cm right to injury No.29. The left end contused, right end sharp. The wound directed backwards injuring the left boarder of sternum and 3rd costal cartilage wound margin regular. No corresponding internal injury.
32. Horizontally placed stab wound 3x2cm right end 5.5cm away from right nipple at 10' O clock position. Right end sharply cut. Left end contused, wound margin regular. The wound was directed backwards injuring the intercostal space and 2nd rib and lungs underneath. Total depth was 6cms.
33. Horizontally placed stab wound 3x1cm, 3cm

above the right nipple at 12 O' clock position. Right end sharply cut left end contused. Wound margin regular and directed backwards involving entire thickness of chest wall without corresponding internal injury.

34. Linear abrasion 3cms long obliquely placed upper left end 3cm below inner end of left collar bone.
35. Superficial incised wound 1x0.5cm over the inner end of the left collar bone.
36. Linear abrasions 1.5cm long 0.5cm left to injury 35.
37. Linear abrasion 8cm long on the left side of the neck front end 6cm below the ear.
38. Linear abrasion 2cm on the back of top of left shoulder.
39. Chop wound 13x10 cm extending 5cm below one ear to the other. The strap muscles, vessels, nerves wind pipe below the hyoid bone and vertebral column cut and divided into two at C5 level. The head was attached to the neck by skin only. The wound margins were regular except for 2 indentation on the left side of the lower flap indicating minimum three inflictions on the neck.
40. Incised wound bone deep 2x0.5cm just in front of left angle of lower jaw.
41. Obliquely placed muscle deep incised wound 6x1cm extending upwards and towards the front from 2.5cm below left ear cutting the pinna of ear and just in front of the ear.
42. Incised wound 2.5x0.5cm just behind left ear ending in injury No.41.
43. Incised wound muscle deep 2.5cm extending forwards from behind the upper part of the left

ear cutting the pinnae of the ear and skin just in front of ear.

44. Incised skin deep 1x0.5cm., 1cm in front of injury No.43.
45. Incised wound skin deep 2cm in front of injury No.44. Injuries No.43,44 and 45 were in a line.
46. Bone deep incised wound is 2.5x0.5cm along with upper border of left eyebrow. Underlying bone fractured.
47. Bone deep incised wound 3x0.5cm just right to injury No.46 underlying bone fractured.
48. Incised wounds 2x0.5cm just below injury No.46.
49. Incised wound 1.5x0.5cm just below injury No.48.
50. Bone deep incised wound 4x1cm. Just behind hairline 7cm above left eyebrow.
51. Contused abrasion 3x2cm. 3cm above inner end of right eyebrow.
52. Superficial lacerated wound 1x0.2cm just above the root of nose.
53. Bone deep incised wound 6x1cm. 8Cm behind and above right ear.
54. Superficial incised wound on the back of right forearm 12cm above the wrist.
55. Superficial incised wound with tailing on the left flank of chest.
56. Superficial incised wound 4x0.5cm inner and back aspect of right forearm 4cm above the wrist.
57. Superficial incised wound 1.5x0.5cm, 12cm

below right knee.

58. Superficial incised wound 0.5x0.2cm, 1cm left to injury No.57.
59. Upper lateral incisor and canine teeth lost with bleeding from sockets and contusion of upper lip."

About 59 injuries were there on the deceased. The injuries would show that he was brutally murdered by a group of persons using different weapons. It was done in the broad day light in the early morning in a public road. However, as held by the Supreme Court in **Mundrika Mahto and others v. State of Bihar** (2002 AIR SCW 2093) even if crime is committed in a most cruel and gruesome manner, court should not be biased unconsciously and involuntarily on the accusation. In spite of the shocking nature of the crime, there should be dispassionate judicial consideration of evidence in a cool detached manner. We are of the opinion that when the crime is very brutal, court should be very careful in analysing the evidence. Accused can be found guilty only if there is conclusive evidence against them.

3. PW1, brother of the deceased, gave Ext.P1 F.I. Statement. He has not seen the incident. F.I. Statement was given at 9.30 a.m. without much delay. In Ext.P1 PW1 stated that his brother

Sunil Kumar was a headload worker. While he was working in the Chambakkara market, somebody informed him that his brother Sunil Kumar was murdered by somebody. He ran towards the place. By that time, his brother was taken to the General Hospital, Ernakulam. He also stated that he saw blood near the house of Sekharan (CW6) (not examined). He went to the General Hospital and got information that his brother died. He also stated that A11 and his children had previous enmity towards them and earlier also they have inflicted injuries on his brothers. He further stated that his brother usually goes to the place of work at Kaloore by bike and he got information that A11, his sons and friends restrained the deceased and inflicted injuries. So, at 9.30 a.m. when the information was received he has the only information that the murder was committed by A11 Vakko, his sons and friends. During deposition he says that he was an accused in a murder case in which his brother was also an accused. He also deposed that one of his brothers is in central jail as he was sentenced to life imprisonment in connection with the murder of a worker belonging to AITUC. His brother Sunil Kumar is a CITU worker. We note that the F.I.R reached the court on the same day and there is no infirmity. But, F.I. Statement is only a starting point of real investigation even though cryptic information regarding the incident was received by the police little earlier and it is not a ground to disbelieve the case of prosecution.

4. PW2 was examined as eye witness and he stated that he was riding as a pillion rider in the bike of Sunil Kumar. According to him, while they were nearing Chambakkara junction, A1, A2 and A3 restrained them and they took sword from behind their shirt. By that time, 5 to 8 persons came there with different weapons and inflicted injuries. He deposed the incident exactly as the prosecution case. He also identified the accused. He stated that he only knew the names of A1 to A3, but, others can be identified by sight. In cross examination he stated that accused earlier inflicted injuries on Satheesan, brother of Sunil Kumar. He also stated that Satheesan, brother of the deceased, is undergoing life imprisonment in a murder case. Sunil Kumar was also an accused in that case and Sunil Kumar had various enemies. A1 to A3 earlier also inflicted injuries on Sunil Kumar. Even though in the statement he stated that he and the deceased used to go to work together, he stated in cross-examination that he was going through that road only for the past one month of the incident. It is also stated that he is residing at Tripunithura and they used to go for work in the bike of Sunil Kumar. He also stated that he knew that A1 also got injuries, but, he denied the suggestion that accused has got injuries by the sword used by the deceased. He is not aware whether anybody has seen the incident other than him. Near the general hospital he saw many co-workers working under CITU.

According to him, he went to the General Hospital only after 12 O' clock, but, he did not discuss anything with the co-workers regarding the incident. He deposed that he did not say anything till he returned from the hospital. He deposed as follows:

“ഞാൻ കണ്ടുവെന്നു പറയുന്ന സംഭവം എന്റെ അറിവിൽ മറ്റാരെങ്കിലും കണ്ടതായിയില്ല . ആശുപത്രിയിൽ വെച്ച് കലുരുള്ള CITU-വിലെ സഹപ്രവർത്തകരെ കണ്ടു ഞാൻ General Hospital-ൽ 12 മണിക്ക് ശേഷമാണ് എത്തിയത് . പതിനൊന്ന് പതിനൊന്നരക്ക് എത്തി . അവിടെയുള്ള മറ്റുള്ളവർക്കുമായി സംഭവത്തെപ്പറ്റി ചർച്ചചെയ്തില്ല. ഞാൻ രണ്ടു മണികഴിഞ്ഞപ്പോൾ തിരിച്ചുപോയി. ആശുപത്രിയിൽ നിന്ന് തിരിച്ചുപോകുന്നതുവരെ സംഭവത്തെപ്പറ്റി ആരോടും പറഞ്ഞില്ല.”

To a definite question in cross-examination he stated that it is not correct that he has not seen the incident and that is why he has not disclosed the matter to the police or close friends or co-workers even at the time when he was in the general hospital. He also denied the fact that he was made a false witness at the instance of Marxist Party. He also deposed that other accused were shown to him by the police on various occasions and apart from the names of A1 to A3 he did not disclose the identification of any of the accused to the police.

5. PW3 is another witness. According to him, he studied up to pre-degree. He is the office bearer of the organization “Voice

of Poonithura” and he saw the incident while he was going to invite Ward Member Devassy for the independent day celebrations of that organization. At that time, he saw three persons, A1 to A3, stopping a motor bike and in the motor bike there were two persons i.e. the deceased and PW2. Thereafter he deposed as per the prosecution case as deposed by PW1. But, he stated that he identified the accused only at the police station. He deposed as follows:

പ്രതികളെ Police Station നിൽവെച്ച് കണ്ട് മനസ്സിലാക്കി.
പോലീസ്കാറോട് പ്രതികൾ പേര് പറഞ്ഞു കൊടുക്കുന്നത്
കേട്ടതാണ്.

He also deposed that he is not aware Devassy belongs to which party. He did not inform the police. About 10 to 20 persons were there. Many shops were also situated on both sides of the road. He further deposed that he left his house at 7 O' clock. He met Devassy between 7.45 a.m. and 8 a.m. and he saw the entire incident. But, he did not disclose it to Devassy. He also stated that when he saw the incident he was unable to see face of the accused. He deposed as follows:

“പ്രതികളുടെ മുഖം കാണാൻ പറ്റുന്നില്ലെന്നേയുള്ളൂ. കത്തി
പൊങ്ങുന്നതും താഴുന്നതും കണ്ടു.”

He deposed that the deceased was involved in political clashes and in such clashes death was occurred and deceased also was an accused. He also deposed that he stated to the police that accused are Vakko (A11) and his sons. He also saw bleeding on the first accused. To a question he answered that MOIഉം MOIVഉം സുനിൽകുമാറിനേറിയം ഷാജിയുടേയും കയ്യിൽ ഉണ്ടായിരുന്നതാണെന്ന് പറഞ്ഞാൽ അല്ല. He further deposed that he was also working in Chambakkara market as a fish broker and Chambakkara market is controlled by CITU union. He did not disclose his visit to Devassy's house. He is also not aware when Devassy came to the place of incident. He informed the matter to the Circle Inspector on the same day, but, his alleged statement under section 161 was not recorded by the Circle Inspector on the same day. If such a statement was recorded, why that was not produced as part of 161 statement is not known. According to him, Hill Palace Police Station is situated two kilometres away from the place of incident. He also stated that Circle Inspector and police officers came there. He did not went to the police station. He only knew that Devassy is a Panchayat Member, but, he did not know anything else about Devassy. He is also not aware about the nearby residents. We are of the view that PW3 is totally lying. He did not produce any evidence to show that he was an office bearer of "Voice of Poonithura". Whether such an organization was existing is also

not proved. It has subsequently come out in evidence that Devassy was also a marxist party ward member and local committee member of the marxist party. Without knowing his party why PW3 went to invite him for meeting is also not proved. There is also no evidence to show that such a function was arranged and there was such an organization. He was completely a chance witness and he was adducing false evidence. There is no chance that he has seen the incident. Investigating Officer also stated that when he gave the remand report on 5.8.1999 and 18.8.1999 and accused were apprehended, he did not mention the name of PW3. But, if he was an important witness, he would have mentioned it. PW2's conduct is also very strange. He was a CITU member and marxist party member. He stated that when he went to the hospital at 12 O' clock, there were CITU workers and friends, but, he did not disclose anything regarding the incident to them. It is true that a cross examination suggestion was that he was not in the motor cycle. But, PW1 in the F.I. Statement did not state whether usually deceased and PW2 were going in the same motor bike. Even assuming that he was going in that motor bike, it is clear that he was not deposing the correct fact. At the maximum he knew that sons of Vakko had enmity towards Sunil Kumar and they have attacked him. But, since he was not a resident of that locality he was not aware of the accused. At the maximum we can assume that he was in the motor bike while deceased was

travelling and they were restrained by three people, thereafter a group of people came and attacked them. He did not see PW3 at the place of incident. Even though the occurrence was in a broad day light in public road near an important junction and many people have seen the incident, none of the eye witnesses spoke regarding the incident.

6. PW4 is a tea shop owner and neighbour. The incident occurred near his tea shop. But, he says that he did not see the incident even though he came to know death of Sunil Kumar and he is not aware who are the accused. But, the evidence would clearly show that deceased was murdered by a group of people. A1 to A3 had got motive also as is evident from the deposition of A1 itself who gave evidence as DW5. A1 also sustained injuries in the same incident as can be seen from Ext.P21 wound certificate proved by PW24. He had sustained bleeding injuries. A1 was examined as DW4. According to DW4 (A1), the deceased came in a motor cycle and inflicted sword injuries on him on the same day that we can see more or less at the same time the incident occurred. Therefore, presence of A1 cannot be denied. Motive is also proved. His injury is not very serious as wound certificate shows the following injury and he was discharged on the next day:

“Profusely bleeding ‘V’ shaped incised wound over the left side of forehead. 1cm. above the left eyebrow. Each side of the wound measuring 3cm long and the distance between the two sides having 1.5cm.”

Even though Ext.P37 FIR was marked as the counter case, the contents of F.I.Statement (Ext.P25 same as Ext.P37) was incriminating. Alleged admissions made by A1 in Ext.P2 cannot be used against him. But, the only admissible evidence is that alleging assault and inflicting injury by deceased on A1, an F.I.R was registered, but, the F.I. Statement produced was clearly a manipulated one. A reading of Ext.P25 F.I.Statement will show that names of all accused are stated by A1 voluntarily even though there was no need for it and it also assumes importance from the evidence of DW4 that his signature in blank paper was taken by the police. We are of the view that Ext.P37 was completely manipulated by the police. But, at the same time, real accused cannot escape. A1 has got injuries in the same incident and presence of A1 cannot be denied. Previous incidents as narrated by him in the evidence itself proves involvement of A1 and his brothers on one side and deceased and his brothers on the other side. Two persons were in the bike. When injuries were inflicted on one side, usually, there will be resistance and some injuries could be caused to the assailants by way of defence. But, A1 is definitely involved in the incident.

7. Now, we will come to the evidence against A2. It is the case of the prosecution that A2 used MO18. MO18 was recovered on the basis of confession (Ext.P6(a)) made by him and the same is admissible in evidence. PW7 corroborated the recovery. Further, dress of A2 was recovered as per Ext.P11 mahazar and that was marked as MOs 29 and 30. MO29 is the shirt. Ext.P36 chemical analysis report shows that shirt of A2 as well as weapon recovered at the disclosure statement of the accused contained blood. Even though origin of the blood in the shirt was not traceable, the blood found in the weapon was identified as that of human blood. Therefore, we are of the opinion that motive, recovery and other circumstances proved that A2 was also involved incident. It is true that when a group of people inflicted injuries on a person with different weapons, it may not be possible to identify the way in which the injuries are inflicted. The Apex Court in **Harshadsingh Pahelvansingh Thakore v. State of Gujarat** ((1976) 4 SCC 640) observed as follows:

“..... When a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder.

Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See: **Amir Hussain v. State of U.P. ((1975) 4 SCC 247)** and **Maina Singh v. State of Rajasthan ((1976) 2 SCC 827)**. Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse, 'they also serve who only stand and wait' a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some splitting drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

(emphasis supplied)

8. In **Masalti v. State of U.P. (AIR 1965 SC 202)** it was observed by the Supreme Court as follows:

"Then it is urged that the evidence given by the witnesses confirms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with

weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault.”

Number of injuries is not corroborating the number of assailants is not a material for convicting the identified assailant who was a member of the unlawful assembly. (See **Bikau Pandey and others v. State of Bihar** (AIR 2004 SC 997)). Apex Court in **Sumer v. State of U.P.** ((2005) 7 SCC 220) held that when an accused is found to be a member of the unlawful assembly, question of attributing any role to him in the commission of murder is of no consequence. But, considering totality of the evidence, we are of the view that A1 and A2 were involved in the crime and they were members of the unlawful assembly. The common object of the assembly was to do away with the deceased. With that intention they waylaid the deceased and PW2 and inflicted fatal injuries on the deceased. There is no recovery of weapon from A3. Even the dress of A3 contained no blood stains. With regard to A4, we have already seen in the earlier statements that only Vakko and his sons were involved. Others' names were not mentioned. Neither PW2 nor PW3 has acquaintance with these persons and they were shown by the police to them as stated in their own evidence and, therefore, there is no conclusive evidence against A3, A4 and A9. On the basis of mere suspicion we cannot affirm the conviction. The prosecution was not able to prove the case against

A3, A4 and A9 beyond reasonable doubt. In the above circumstances, conviction and sentence passed against accused Nos.3, 4 and 9 (appellants in Crl.A.No.1650 & 1948 of 2005) are set aside and they are acquitted. They should be released from the jail forthwith if they are not required in any other case.

Crl.A.Nos.1650 and 1948 of 2005 are allowed and Crl.A.1643 of 2005 and Crl.R.P.No.70 of 2006 are dismissed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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